

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies	)	
For Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 04-440
From Title II and Computer Inquiry Rules	)	
With Respect to Their Broadband Services	)	

**QWEST'S OPPOSITION TO MOTION FOR EXPEDITED ORDER ON  
VERIZON PETITION FOR FORBEARANCE**

Qwest Corporation and Qwest Communications Corporation (jointly "Qwest") hereby oppose the Motion for Expedited Order on Verizon Petition for Forbearance.<sup>1</sup> Verizon's forbearance petition<sup>2</sup> was deemed granted when the Federal Communications Commission ("Commission") failed to deny it by March 19, 2006. Covad Communications Group, NuVox Communications, Inc., and XO Communications, LLC ("Covad, *et al.*") now request that the Commission enter an order denying Verizon's petition on the grounds that Verizon has not met the substantive statutory requirements for forbearance. In the alternative, Covad, *et al.*, ask the Commission to issue an order explaining the deemed grant, and expressly stating that the grant is limited as described in Verizon's February 7, 2007 *ex parte* letter. The Commission should deny the Motion.

---

<sup>1</sup> Motion for Expedited Order on Verizon Petition for Forbearance, filed July 25, 2007 ("Motion").

<sup>2</sup> See Petition of the Verizon Telephone Companies for Forbearance, WC Docket No. 04-440, filed Dec. 20, 2004, as limited by Verizon's Feb. 7, 2006 *ex parte*, Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, from Edward Shakin, Verizon and by Verizon's Feb. 17, 2006 *ex parte*, Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, from Edward Shakin, Verizon ("Shakin *ex partes*").

**I. BECAUSE THERE WAS NO AGENCY ACTION, THE AGENCY NEED NOT ISSUE A WRITTEN ORDER**

The grant of Verizon's petition for forbearance is "final" in that the Commission proceeding is complete and the agency cannot act further in that docket. Nonetheless, there is no reviewable "final order" of the Commission under 28 U.S.C. § 2342(1) or "final agency action" under 5 U.S.C. § 704. As explained in the briefs filed before the D.C. Circuit, nothing the Commission has done determined any rights or obligations or gives rise to any legal consequence. The legal consequences of which Covad, *et al.*, complain flow directly from the application of Section 160(c), and the congressional policy of deregulation embodied in that section.<sup>3</sup> Because the agency's action was final the Commission cannot issue an order denying the deemed grant. Nor can the Commission turn the deemed grant into a grant by Commission action and explain the grant with an order.

Covad, *et al.*, read too much into the cases that they cite for the proposition that the Commission still has jurisdiction to act after the deemed grant. *SWBT v. FCC* says that absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action.<sup>4</sup> Section 204, the statute at issue in that case, did not give any consequence for failure to abide by the five-month statutory deadline. Similarly, *Brock v. Pierce County*, 476 U.S. 253, 260 (1986), does not support Covad, *et al.* As in *SWBT v. FCC*, the statute at issue in *Brock* did not provide any statutory direction as to what happens in the event of a failure to meet the deadline. By contrast to the situations in *SWBT v. FCC* and *Brock v. Pierce County*, Section 160(c) provides a specific statutory direction that in the instance of a failure to deny within the statutory time frame the petition is deemed granted.

---

<sup>3</sup> See *Sprint Nextel v. FCC*, Brief for Intervenors in Support of Respondents, Case No. 06-1111, *et al.*, dated July 5, 2007 at 5-6.

<sup>4</sup> *SWBT v. FCC*, 138 F.3d 746, 749 (8th Cir. 1998).

Covad, *et al.*, argue that the Commission should issue a written order, but seem uncertain of any statutory ground for such a requirement. They resort to arguing that it is “unfair and inappropriate for the Commission to fail to render a substantive written ruling and later claim that such failure is beyond appellate review”.<sup>5</sup> Later, Covad, *et al.*, concede that the deemed grant may not strictly invoke the Section 552 of the Administrative Procedure Act requirement of publication,<sup>6</sup> and that “it may be debatable whether the Commission is legally obligated to comply with Section 552 in this circumstance.”<sup>7</sup> Arguments about what Covad, *et al.*, deem unfair and inappropriate carry no weight. The issue is whether Section 160 requires a written order in the instance of a deemed grant. As Covad, *et al.*, concede the statute does not impose such a requirement.

Section 160(c) requires a written order in the instance of Commission decision to “grant or deny in whole or in part.”<sup>8</sup> Here, there has been no Commission decision. Rather the deemed grant flows from an Act of Congress. Thus, there is no agency rationale to be explained. Accordingly, the four cases that Covad, *et al.*, cite for the proposition that written explanations of agency action ensure rationality and accountability and assist judicial review do not support the argument that the Commission has jurisdiction to issue an order here.<sup>9</sup>

---

<sup>5</sup> Motion at 16.

<sup>6</sup> *Id.*.

<sup>7</sup> *Id.* at 17.

<sup>8</sup> 47 U.S.C. § 160(c).

<sup>9</sup> *Automotive Parts & Accessories Assoc. v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968) (examining results of agency action, not a deemed grant); *Home Box Office Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977); *Lloyd Noland Hospital & Clinic v. Heckler*, 762 F.2d 1561 (11th Cir. 1985); *Natural Resources Defense Council v. SEC*, 389 F. Supp. 689 (D.D.C. 1974).

## **II. EVEN IF THERE WERE AN AGENCY ACTION, THE COMMISSION SHOULD DENY THE MOTION AS AN IMPROPER PETITION FOR RECONSIDERATION**

Even if the grant were not an act of Congress, but a final agency action, Covad, *et al.*'s, request should be denied as an improper and untimely request for reconsideration. Under rule 1.106(f) a party may file a petition for reconsideration within 30 days from the date of the public notice of the final Commission action. Covad, *et al.*, filed their request 16 months too late. It should be denied on that ground alone. Moreover, Covad, *et al.*, have come forward with no new facts or change of circumstances that would merit reconsideration. They only point to a change in composition of the Commission, *i.e.*, that Commissioner McDowell has joined the Commission and has reached the end of his recusal period.<sup>10</sup> A change in the Commission's composition is not adequate basis for reconsideration.

*Qwest v. FCC*<sup>11</sup> and *Core Communications v. FCC*<sup>12</sup> do not support Covad, *et al.* Those cases stand for the proposition that filing a petition for reconsideration is a condition precedent to judicial review of any Commission order where the party seeking such review relies on question of fact or law upon which the Commission has been afforded no opportunity to pass. Accordingly, if the deemed grant were a Commission action, the proper procedure would have been for Covad, *et al.*, to timely file a petition for reconsideration. Covad, *et al.*, did not do so, and cannot cure this failure at this late date.

---

<sup>10</sup> Motion at 19.

<sup>11</sup> *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

<sup>12</sup> *In re: Core Communications, Petitioner, Level 3 Communications, LLC, et al., Intervenor*, 455 F.3d 267 (D.C. Cir. 2006), *pet. for reh'g. denied*, 2006 U.S. LEXIS 25686 (Oct. 13, 2006).

### III. THERE IS NO QUESTION AS TO WHAT RELIEF WAS DEEMED GRANTED

Covad, *et al.*, claim that a written order is necessary to alleviate confusion “regarding exactly what relief has been deemed granted to Verizon.”<sup>13</sup> There should be no such confusion. In its Shakin *ex partes*, Verizon limited its requested relief, thereby withdrawing part of the request made in its December 2004 petition. Because the requests for broader relief had been withdrawn, and were no longer pending as of March 19, 2006, the broader request was not deemed granted.

### IV. CONCLUSION

For the foregoing reasons the Commission should deny the Motion for an order on the Verizon Forbearance Petition.

Respectfully submitted,

QWEST CORPORATION AND  
QWEST COMMUNICATIONS  
CORPORATION

By: Daphne E. Butler  
Craig Brown  
Daphne E. Butler  
Suite 950  
607 14<sup>th</sup> Street, N.W.  
Washington, DC 20005  
(303) 383-6653

Their Attorneys

August 13, 2007

---

<sup>13</sup> Motion at 17.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **QWEST'S**  
**OPPOSITION TO MOTION FOR EXPEDITED ORDER ON VERIZON PETITION FOR**  
**FORBEARANCE** to be: 1) filed with the Office of the Secretary via the FCC's Electronic  
Comment Filing System in WC 04-440; 2) served via e-mail on Ms. Janice Myles, Competition  
Policy Division, Wireline Competition Bureau at [Janice.Myles@fcc.gov](mailto:Janice.Myles@fcc.gov); and 3) served via e-  
mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

/s/Richard Grozier

August 13, 2007